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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD HAMMOND,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

* * *

PETITION FOR WRIT OF CERTIORARI FROM THE APPELLATE COURT OF THE FOURTH JUDICIAL DISTRICT OF ILLINOIS

* * *

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QUESTIONS PRESENTED FOR REVIEW

I. WHERE THE PROSECUTION'S CHIEF WITNESS, HERSELF AN UNINDICTED CO-CONSPIRATOR, HAS BEEN GRANTED IMMUNITY FROM PROSECUTION IN RETURN FOR HER TESTIMONY, DUE PROCESS OF LAW AND ESTABLISHED PRECEDENT OF THIS COURT REQUIRE THAT PETITIONER BE GRANTED A NEW TRIAL WHERE THE PROSECUTION CONCEALED EVIDENCE OF THE IMMUNITY UNTIL AFTER TRIAL.

II. THE PETITIONER WAS DENIED A FAIR TRIAL AND DUE PROCESS OF THE LAW WHEN THE COURT ERRONEOUSLY INSTRUCTED THE JURY AND ALLOWED THE CONVICTION TO STAND WHERE THE RECORD WAS INSUFFICIENT TO PROVE SUCH CHARGE BEYOND A REASONABLE DOUBT.

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United States v. Wieschenberg, 604 F.2d 326 (5th Cir. 1979).

State v. Allen, 293 N.W.2d 16 (Iowa 1980).

State v. Davis, 598 S.W.2d 189 (Mo. Ct. App. 1980).

Illinois Judicial Conference Committee on Pattern Jury Instructions in Criminal Cases; ILLINOIS PATTERN JURY INSTRUCTIONS - CRIMINAL 57 (1968).

OPINION BELOW

The opinion below, People v. Hammond, 82 Ill.App.3d 839, 403 N.E.2d 305 (1980), appears in an appendix to this Petition for Certiorari.

JURISDICTION

The verdict of the jury in this cause was returned on February 7, 1979 and the sentencing order entered on April 30, 1979. The opinion of the Appellate Court for the Fourth Judicial District of Illinois was entered on April 11, 1980. A Petition for Rehearing by the Appellate Court

was filed on May 2, 1980 and denied on May 8, 1980. Petitioner's Affidavit of Notice of Intent to Seek Review in the Supreme Court of Illinois was filed on May 12, 1980 and the Petition for Leave to Appeal to the Supreme Court on June 11, 1980. The petition was denied by the Supreme Court of Illinois on September 29, 1980 and the mandate issued to the Fourth District Appellate Court on October 23, 1980. This petition is timely filed within sixty (60) days of the entry of the order denying review by the Supreme Court of Illinois. This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Constitution of the United States of America, Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land

or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Constitution of the United States of America, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The Constitution of the State of Illinois (1970), Article I, Section 2.

DUE PROCESS AND EQUAL PROTECTION

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

4. Chapter 110A, Illinois Revised Statutes (1979), Section 412(c).

> Except as is otherwise provided in these rules as to protective orders, the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor.

5. Chapter 110A, Illinois Revised Statutes (1979), Section 451(a).

> Whenever Illinois Pattern Instructions in Criminal Cases (IPI-Criminal) contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI-Criminal instruction shall be used, unless the court determines that it does not accurately state the law. Whenever IPI-Criminal does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial, and free from argument.

STATEMENT OF THE CASE

In February, 1976, Tommi Roscetti (a/k/a Dorothy Roscetti, a/k/a

Dorothy Morris) met Lavada Woolums in Springfield, Illinois. (VOLUME XIII, Page 9.) At the time she met Woolums, Roscetti was 16 years old, was on probation for unlawful cohabitation and was a runaway from home residing with a known prostitute (VOLUME XIII, Pages 10, 37, 38.) After meeting Woolums, they dated and Roscetti fell in love with him. Both Roscetti and Woolums made plans for the future, including the opening of massage parlors and bars. (VOLUME XIII, Pages 38, 39.)

Shortly after meeting Woolums, Roscetti left Springfield with him and his brother Terry, traveled to Poplar Bluffs, Missouri and returned to Springfield. It was originally agreed between Woolums and Roscetti that Roscetti would work as a prostitute in Springfield, Illinois. (VOLUME XIII, Page 40.) Shortly after returning from Poplar Bluffs, Missouri, Ros-

cetti left Springfield with Woolums, his brother Terry and sister-in-law Kathy and traveled to Rockford, Illinois. During her travels with Lavada, Terry and Kathy Woolums, Roscetti engaged in sexual relations with all three. (VOLUME XIII, Pages 39, 40.)

From Rockford, Kathy Woolums traveled with Roscetti to Quincy, Illinois. It was Kathy Woolums who explained what Roscetti's duties were to be in Quincy.

In November, 1978, Dorothy Roscetti gave a statement under oath to the effect that on March 3, 1976, she traveled to Poplar Bluffs, Missouri. On March 4, 1976 she returned to Springfield. The next day she traveled to Rockford and it was not until several days later that she arrived in Quincy. (VOLUME XIII, Page 47.)

No testimony was presented concerning any connection between the defen-

dant, Tommi Roscetti and Lavada Woolums prior to Roscetti's arrival in Quincy. No testimony was presented concerning any mention of the petitioner, Donald Hammond, by Lavada Woolums, Terry Woolums, or Kathy Woolums at any time before or after Roscetti's arrival in Quincy.

When Roscetti first arrived in Quincy, she merely met the petitioner, Donald Hammond. It was not until a couple of days later that she had any conversation with him. (VOLUME XIII, Pages 41, 42.) On her first day in Quincy and prior to talking with the petitioner, Roscetti practiced prostitution. (VOLUME XIII, Pages 42, 43.)

Roscetti remained in Quincy for approximately three weeks. During this three-week period she left Quincy on two occasions, once traveling to Chicago with two truck drivers and having intercourse with one of them. (VOLUME XIII, Page 42.)

On April 23, 1976, Roscetti provided a statement to police officers indicating that it was not until March 7, 1976, that she first arrived in Quincy. (VOLUME XIII, Page 47.)

While Roscetti was in Quincy, she indicated she was answerable only to Lavada Woolums. (VOLUME XIII, Page 49.) Her entire connection with the petitioner was two brief conversations occurring a number of days after she arrived in Quincy and after she was engaging in prostitution. (VOLUME XIII, Pages 14, 17, 18, 24.) No testimony was presented concerning any agreement among and between the petitioner, Lavada Woolums and Elaine Hammond. No testimony was presented regarding instructions provided by the petitioner other than one brief conversation many days after Roscetti arrived in Springfield and after she was practicing prostitution, she

having been previously instructed by Kathy Woolums and answerable solely to Lavada Woolums.

Subsequent to these events, Dorothy Roscetti enlisted in the Army and on two occasions was AWOL. Subsequently, she was convicted of prostitution in South Carolina. (VOLUME XIII, Page 38.) After being discharged from the Army, Roscetti became "unavoidably pregnant" and gave up the child for adoption. (VOLUME XIII, Page 37.)

Both Roscetti's father and foster brother testified on behalf of the petitioner. Both testified that Tommi Roscetti had a bad reputation for telling the truth and they would not trust her under oath. (VOLUME XIII, Pages 94, 97.)

On May 26, 1978, two Illinois Bureau of Investigation agents, Charles Baley and Mark Hindley, provided an in-

formant, Eddie Martin, with $25-$35 to enter the Poodle Tavern located inside the New Virginia Hotel, engage a prostitute and have sexual relations with her. Martin had performed these same services in the past on behalf of IBI. (VOLUME XIII, Pages 69, 75, 77.) After being sent into the Poodle Lounge, the informant returned and advised the IBI agents that he had sexual relations with a girl on crutches for money. The agents came into the hotel and met the petitioner who referred the agents to the desk clerk, Mr. Guy, and obtained a key to the room where the informant had sexual relations. The girl on crutches could not be found. During this period, the petitioner attempted to assist the agents in locating the alleged prostitute. (VOLUME XIII, Page 82.) The petitioner advised the agent he had no knowledge of anyone having sexual relations. (VOLUME

XIII, Page 82) When the agents, disregarding the petitioner's lack of knowledge, told the petitioner to have the alleged prostitute turn herself in for prosecution, the petitioner became upset and demanded to know who the male partner was and why he was not being prosecuted. (VOLUME XIII, Page 58.)

No evidence was presented to show any connection or control over the Poodle Lounge or the New Virginia Hotel by the petitioner, Donald Hammond.

On July 7, 1976, based upon the statements and testimony of Tommi Roscetti, a Bill of Indictment was returned in case number 76-CF-91 (VOLUME I, Page C1) alleging in Count One that the petitioner, Elaine Hammond and Lavada Woolums on or about March 3, 1976, committed the offense of Pandering in that they, for money, compelled Tommi Roscetti to become a prostitute, and in Count Two that they arranged

a situation in which she might practice prostitution. On November 22, 1976, the case was dismissed on the motion of the prosecution due to the unavailability of a witness, Tommi Roscetti, and due to the pending speedy trial demand of the petitioner. (VOLUME VI, Page 12, 13.)

On June 7, 1978, again based upon the Grand Jury testimony of Roscetti relating the same events of 1976 upon which the previously dismissed indictment in 76-CF-91 was returned, a new Bill of Indictment was returned in case number 78-CF-92 alleging that the petitioner, Elaine Hammond and Lavada Woolums, on or about March 3, 1976, committed the offenses of Conspiracy and Pandering. (VOLUME I, Page C1.) Before the Grand Jury, the State's Attorney specifically refrained from inquiry as to the residence or whereabouts of witness Roscetti.

Demands for the disclosure of witnesses and for disclosure of information favorable to the defense had been duly filed in 76-CF-91, (VOLUME I, Pages C7, 10.) and 78-CF-92. (VOLUME I, Pages C11, 14.) The record discloses four motions to dismiss filed as a result of the failure of the prosecution to provide the requested information (VOLUME I, Pages C194, 207, 224, 237) as well as a motion for sanctions directed to the prosecution. (VOLUME I, Page C256.)

On June 9, 1978, the court set this matter for trial on September 11, 1978 and ordered the State to provide discovery by July 19, 1978. (VOLUME I, Page C5.) On July 24, 1978, the petitioner filed a Motion for Discovery (VOLUME I, Page C11), Motion to Suppress Statements provided May 26, 1976 (VOLUME I, Page C16) and a Demand for Speedy Trial. (VOLUME I, Page C35.)

By August 21, 1978, the prosecution had not complied with court ordered discovery. On this date, the prosecution requested one week to respond to discovery. (VOLUME IV, Page 10.) Due to the prosecutions failure to provide discovery, this case was taken off the September 11, 1978 trial setting. (VOLUME IV, Pages 15, 16.) The State's Attorney promised the court to furnish discovery no later than August 29, 1978. (VOLUME IV, Pages 16, 17.)

It was not until September 29, 1978 that the prosecution provided any discovery in this matter. On this date, the prosecutor handed petitioner's attorney a partial answer to Motion for Discovery which did not comply with prior court orders. (VOLUME V, Page 3.) This case was set for trial in October of 1978 and the prosecution had not even provided petitioner with a list of names and addresses of possible

witnesses. The State's Attorney, in open court on September 29, 1978, promised the Court that he would provide the petitioner with names of witnesses and last known addresses. (VOLUME V, Pages 4-7.) At the hearing of September 29, 1978, the Court inquired of the prosecution when it could provide the petitioner with previously ordered discovery. The prosecution indicated it would comply with discovery on October 10, 1978 and the court so ordered. Due to the fact that the petitioner would not receive necessary discovery until October 10, 1978, the court was forced to reset this matter for trial on November 27, 1978 with pre-trial review on November 20, 1978. (VOLUME V, Pages 25-27.)

On November 13, 1978, the prosecution's failure to comply with court ordered discovery still continued. The prosecution failed to disclose the where-

abouts of the prosecution's chief witness, Tommi Roscetti. (VOLUME VI, Pages 3, 4.) The State's Attorney indicated in court on November 13, 1978, that he did not know the whereabouts of Roscetti but was only in possession of a telephone number, which he refused to disclose. (VOLUME VI, Pages 5, 7.) It was at this hearing on November 13, 1978, two weeks prior to the November 27, 1978 trial setting, that the State's Attorney admitted in open court and on the record that the 1976 cases against the petitioner were dismissed due to a pending speedy trial demand. (VOLUME VI, Pages 12, 13.) On the basis of the State's Attorney's representation that he was in a position to learn the whereabouts of witness Roscetti, the court directed that Roscetti be brought into court on November 20, 1978, and this matter was allowed to remain on the November 20, 1978 trial setting. (VOLUME

VI, Pages 13, 14, 21, 23.)

On November 20, 1978, Tommi Roscetti did not appear in Court. (VOLUME VII, Pages 4, 5.) At this hearing, the petitioner's counsel asserted to the court that the 1976 cases were dismissed due to applicability of the 160 day rule. The State's Attorney did not contest this assertion. (VOLUME VII, Pages 6, 9, 18, 19, 21, 22.) At this hearing, the State's Attorney refused to disclose to the Court from what airport Tommi Roscetti was departing. (VOLUME VII, Page 10.) The court stated that it would consider a dismissal if the evidence disclosed a willful failure of the State's Attorney to comply with discovery (VOLUME VII, Pages 13, 14) and proceeded to keep this matter on the November 27, 1978 trial setting. The court further stated that the petitioner would not be forced to go to trial

on November 27, 1978, without full pre-trial discovery. (VOLUME VII, Page 16.) The previous address of Roscetti produced by the State's Attorney was an incorrect address. (VOLUME VII, Pages 23, 24.) At this hearing of November 20, 1978, the State's Attorney admitted that he knew where Roscetti was located. (VOLUME VII, Page 24.) At this hearing the court further inquired as to the length of time before 160 days ran on this case. The State's Attorney misrepresented to the Court that there had been no speedy trial demand, when in fact, there is a written demand of record. (VOLUME VII, Pages 24, 25.) The court once more ordered the prosecution to provide the petitioner with the location of Roscetti. (VOLUME VII, Pages 26.) Even after this court order, the State's Attorney requested leave to be excused from complying with the order to provide peti-

tioner with address of Roscetti. The Court did not grant leave excusing such compliance. (VOLUME VII, Page 27.)

On November 27, 1978, the day of the trial setting, the prosecution notified the petitioner of an additional witness. (VOLUME VIII, Page 4.) The State's Attorney, once more in a direct response to the court's inquiry, advised the court that all he had was a telephone number, which he refused to disclose. (VOLUME VIII, Pages 6-13.)

The petitioner was ready to proceed to trial on November 27, 1978. Due to the prosecution's failure to provide discovery, the court reset this matter for trial. The petitioner suggested the date of January 3, 1979, still within 160 days from the filing of the petitioner's demand for speedy trial. The prosecution suggested the date of February 5, 1979,

which exceeded 160 days from the filing of the petitioner's demand for speedy trial. (VOLUME VIII, Pages 17, 18.) At the hearing of November 28, 1978, contrary to all representations of the prosecution, Tommi Roscetti, while refusing to disclose her address for the purpose of a background investigation, agreed to disclose a telephone number where she could be reached. (VOLUME VIII, Page 14.)

During the course of these numerous delays caused by the prosecution's failure to provide court ordered discovery, a material witness on behalf of the petitioner, Jimmy O'Neil, died. (VOLUME IX, Pages 5-7.) By January 17, 1979, the prosecution had yet to provide the defense with the location or telephone number of Roscetti for the purpose of conducting a background investigation. This date was more than 160 days from the filing of the

demand for speedy trial. On this date, the prosecution filed a Motion for Relief to prevent disclosing the telephone number which Tommi Roscetti had agreed to provide almost two months previously. (VOLUME I, Page C236.) At the hearing of January 17, 1979, the State's Attorney admitted categorically that he not only knew the city where Roscetti was located, but had known the general area and whereabouts of Roscetti since before she testified before the Grand Jury in June of 1978. The State's Attorney thereby admitted to knowingly making false representation to the court and defense counsel as to his knowledge of the whereabouts of the sole witness against the petitioner. (VOLUME IX, Pages 19-32, 36.)

The burden is upon the prosecution to prove the Defendant guilty beyond a reasonable doubt. Defense counsel need

not, indeed cannot, object during the prosecution's case in chief that it is not meeting the burden of proof. The record discloses that defense counsel moved for a directed verdict at the close of the prosecution's case and at the close of all the evidence. (VOLUME XIII, Pages 87 and 89, respectively.) The patent insufficiency of the evidence was raised in the Amended Post Trial Motion. (VOLUME I, Pages C337, 338 and 340.) On appeal, the issue was raised in the Appellant's Brief and Argument (at page 10), Petition for Rehearing (at page 16) and Petition for Leave to Appeal to the [Illinois] Supreme Court (at page 14).

I

WHERE THE PROSECUTION'S CHIEF WITNESS, HERSELF AN UNINDICTED CO-CONSPIRATOR, HAS BEEN GRANTED IMMUNITY FROM PROSECUTION IN RETURN FOR HER TESTIMONY, DUE PROCESS OF LAW AND ESTABLISHED PRECEDENT OF THIS COURT REQUIRE THAT PETITIONER

BE GRANTED A NEW TRIAL WHERE THE PROSECUTION CONCEALED EVIDENCE OF THE IMMUNITY UNTIL AFTER TRIAL.

The prosecution had essentially one weapon in its arsenal, the testimony of Tommi Roscetti (a/k/a Dorothy Roscetti, a/k/a Dorothy Morris). While the prosecution introduced further testimony by Illinois Bureau of Investigation agents purporting to be "corroborating evidence" as to the petitioner's guilt, it is quite clear that such testimony would have been meaningless had the jury chosen to disbelieve witness Roscetti. That the testimony of witness Roscetti was realized by the prosecution to be the entire foundation on which its case rested is clearly apparent from its conduct in attempting to conceal and hide Roscetti from the defense. At trial there was much impeachment evidence from which the jury could have concluded that Roscetti was not a credible

person and for that reason rejected her testimony. Evidence as to the credibility of witness Roscetti of which the jury was never advised, however, was that the prosecution had offered, and she had accepted, an offer of immunity from prosecution in exchange for her testimony. Evidence and details concerning this offer of immunity were concealed from the defense until after the jury had returned its verdict against Donald Hammond.

The function of the prosecutor in our system of criminal justice is not that of a hired gun but, rather, that of an officer of the Court with a sworn duty to see that justice is done. The rules which guide a prosecutor stem from several sources including statute, rule, precedent and the Constitutions of the United States and of the State of Illinois. One of the obligations of the prosecutor is

to provide the defense with certain information upon request. Included in this obligation is the duty to disclose to the defense any evidence which is favorable to the defense. Illinois Supreme Court Rule 412(c), Chapter 110A of the Illinois Revised Statutes, requires as follows:

> "Except as is otherwise provided in these rules as to protective orders, the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor."

The defense did make request of the prosecutor every item of discoverable information under the rules including the following:

> "That the prosecution disclose to the defense the name and addresses of any witness or witnesses that may be or would be favorable to the defense. These witnesses to be clearly and separately identified on the List of Witnesses. The same disclosure is requested of any physical evidence or scientific evi-

> dence that might be or would be favorable to the defense." (VOLUME I, Page C14.)

Where this request was made in writing, as here, it is no longer a matter of prosecutorial strategy to avoid disclosure of evidence favorable to the defense, it is a denial of due process of the law.

The decision below is in conflict with other decisions of the Illinois courts based upon the cited discovery rule and results in an unequal application of the law. The defense in People v. Nichols, 63 Ill. 2d 443 (1976), made a Rule 412 request for disclosure of "all evidence in its [the prosecution's] possession that might be favorable to the defendants which was material to the questions of their guilt or innocence" and for production of "all physical evidence that is in the State's possession and control which pertains to this case." (63 Ill.2d 443, 445). While

the prosecution disclosed a crime laboratory report relating to a certain shoe found at the scene, the shoe itself was not produced despite further requests of record. The Illinois Supreme Court affirmed the Appellate Court's reversal of the convictions for failure to comply with Rule 412. In People v. Keith, 66 Ill.App. 3d 93 (1978), a Rule 412 request included the following paragraphs:

> "4. Any reports or statements of experts, made in connection with this particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.
>
> * * *
>
> 8. Any information in the possession of the prosecution which would tend to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor as per Brady v. Maryland."
>
> (66 Ill.App.3d 93, 97.)

In their compliance with the discovery de-

mands of the defense, the prosecution provided an illegible copy of a certain scientific test performed by the crime lab. The prosecution contended on appeal that the results of the test were "inconclusive" and therefore could not be considered favorable to the defense. The conviction was reversed, the court finding that the result was material to the credibility of the defendant and that the prosecution had violated his right to pre-trial discovery and due process despite the illegible copy of the report provided the defense.

The Illinois rules concerning criminal discovery are just one source of the prosecution's obligation to afford a defendant the due process of the law. The leading decision of this Court dealing with the due process requirement upon the prosecution to furnish the defense with knowledge of evidence favorable to the

defense is Brady v. State of Maryland, 373 U.S. 83, (1963). In Brady, the defendant and a companion were tried for and convicted of murder. Prior to the trial the defendant's counsel had requested the prosecution to disclose the co-defendant's confessions and extrajudicial statements. While several such statements were disclosed, one in which the co-defendant admitted the actual killing was withheld until after trial and after the conviction had been affirmed. This Court agreed that suppression of the confession was a violation of the Due Process Clause of the Fourteenth Amendment and formalized the constitutional mandate as follows:

> "We now hold that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."
>
> (373 U.S. 83, 87.)

The Brady rule was expanded and further defined in United States v. Agurs, 427 U.S. 97 (1976). In Agurs the defendant was convicted of murder in the second degree following a jury trial during which it was argued that she was acting in self-defense. The facts from which that defense was argued were that the defendant had screamed for help during the altercation, that when help arrived the decedent was on top of the defendant and that the possession of two knives by the decedent indicated that the decedent was a violence-prone person. Three months after the trial, defense counsel discovered that the decedent had a prior criminal record (assault and carrying a deadly weapon in 1973; carrying a deadly weapon in 1970) and moved for a new trial on the ground that the prosecution failed to disclose the criminal history.

Basically stated, one significance of Agurs is that certain evidence in the hands of the prosecution may be of such an obviously exculpatory character that it puts the prosecution on notice of a duty to disclose the evidence. This is true even where no request whatsoever has been made for production of exculpatory evidence. In so ruling this Court found that in presenting such evidence the defense need not satisfy the standard applied to a motion for a new trial based upon newly discovered evidence, need not demonstrate that the newly discovered evidence probably would have resulted in acquittal. Where the newly discovered evidence was known to the prosecution at trial, some lesser standard will suffice.

The same Fourth District Appellate Court of Illinois which rendered the decision below in People v. Payne,

44 Ill.App.3d 502 (1976), reversed the robbery conviction of a defendant where the prosecution failed to disclose a police report containing a memorandum of an eyewitness' statement which differed in several respects from the testimony on which the conviction was based. The discovery request had included, pursuant to Illinois Supreme Court Rule 412(c), a request for material and information tending to negate the guilt of the defendant. The Court cited from its decision in People v. Parton, 40 Ill.App.3d 753, 758 (1976), as follows: "However, we note that it is not the function of an appellate court to speculate to what use a defendant and his counsel may put material evidence withheld them in violation of Rule 412." The Court ruled in Payne that:

> "Accordingly this court need not make an express determination that the defendant has acutally been deprived of a fair trial when requested or favorable information is withheld,

because the prosecutor who withheld the information played an important role in charting the course of the trial against the defendant."

(44 Ill.App.3d 502, 507.)

In Agurs the District Court denied the motion for a new trial, which decision was reversed on appeal. This Court reversed the appellate decision inasmuch as there was such overwhelming evidence of the defendant's guilt of record that the concealed evidence was insignificant in comparison. The opinion continues:

"Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to

create a reasonable doubt."

(427 U.S. 97, 112.)

In the case at bar there is no evidence from which the jury could find a prima facie case of conspiracy against Donald Hammond, much less proof beyond a reasonable doubt, had the testimony of witness Roscetti not been believed.

The Court rendering the decision sought here to be reviewed considered this argument but misapprehended the effect of the offer of immunity upon the jury's determination of the credibility of witness Roscetti where it characterized such evidence as "merely repetitive".

The characterization is directed to the repetitive, or cumulative, effect of the evidence. In light of the amount of impeachment evidence presented at trial, it seems incredible that the testimony of witness Roscetti would merit any attention

whatsoever. With her numerous instances of unlawful cohabitation, prostitution, "unavoidable pregnancy" and sexual escapades with related members of both sexes, her biography would read like a dime novel. Her credibility was succinctly reviewed by the late Charles A. Bellows in his post trial arguments. (VOLUME XV, Pages 4-17.) Each and every of these unsavory details goes to her life as a whole, and would likely convince a jury that she would not be a character they would care to be associated with. The undisclosed offer of immunity in exchange for her testimony in this cause, however, is a different type of evidence altogether and directly relates to her credibility in this proceeding. It is evidence not that Roscetti has lived the life of a terrible person, which the jury already had ample opportunity to observe, but that Roscetti had

a specific and compelling reason for testifying exactly as the prosecution wished in this specific proceeding.

Evidence determined to be cumulative should not be admitted and its admission in a proper case may be error. Excluding evidence on the ground that it may be cumulative, however, is also a fertile ground for error. Cumulative evidence has been defined as follows:

> "Cumulative evidence is additional evidence of the same kind tending to prove the same point as other evidence already given; evidence which merely strengthens a party's position on a conflict already existing in the evidence produced at the trial. Evidence of a different kind or of other and different circumstances tending to establish or disprove the same fact is not cumulative."
>
> (32A C.J.S. Evidence § 1016)

The evidence consisting of the concealed offer of immunity concededly goes to the same ultimate issue as the other impeachment evidence, to the credibility of wit-

ness Roscetti. It is evidence of a different type, however, in that it has reference not to the entire sordid life of Roscetti, but specifically to her credibility during the time she took the stand on behalf of the prosecution.

The importance of cross-examination as to every element of possible bias or prejudice on the part of a witness was considered by this Court in Davis v. Alaska, 415 U.S. 308 (1974), wherein the trial court had denied the defense the opportunity to cross-examine a key witness for the prosecution as to a prior adjudication of juvenile delinquency against the witness and his probationary status at the time of the events as to which he was to testify. The defense particularly objected that the ruling prevented them from establishing that the witness was subject to undue pressure from the police and possibly in fear of revocation of his probationary status.

This Court rejected the prosecution's argument that the line of attack was a mere "rehash" of prior cross-examination and reversed the conviction, stating as follows:

> "A more particular attack on witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.
>
> * * *
>
> On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'"

(415 U.S. 316, 318.)

Another manner in which the fundamental importance of disclosing offers of immunity from prosecution in criminal pro-

ceedings can be seen is to look to the result where the Illinois courts have erroneously refused cautionary instructions concerning the weight to be afforded the testimony of an immunized witness. In People v. Rees, 268 Ill. 585 (1915), the Illinois Supreme Court found reversible error in the court's refusal to instruct the jury concerning the credibility of an immunized witness:

> "It scarcely need be said that the fact of a witness having been promised immunity from prosecution for crime on condition that he will testify for the People must be considered in weighing his testimony."
>
> (268 Ill. 585, 593.)

In the case at bar, no such cautionary instruction could be given inasmuch as the immunity was concealed from both the court below and the defense. As a result of the failure to afford the petitioner the due process of the law by disclosing the immunity, not only could there be no instruc-

tion by the court as to the credibility of an immunized witness, but the defense was also denied the right of cross-examination and argument to this point.

Under Illinois law the disclosure requirement applies equally to impeachment evidence. In People v. Dixon, 19 Ill.App.3d 683 (1974), defendant Dixon was convicted of murder for the death of one Ronald Thompson. The Illinois appellate court relied on the ruling of this Court in Brady in reversing the conviction below and found that certain statements tending to impeach the state's chief witness should have been disclosed to the defense prior to trial: "To hold otherwise would be to encourage conduct evasive of the rules requiring disclosure of evidence favorable to defendant." (19 Ill. App.3d 682, 687.) The prosecution further claimed that any prejudice resulting from the failure to disclose the statement was

cured when the testimony was heard by the trial court at the post trial motion. The court categorically rejected that contention holding:

> "We do not agree that the hearing on the motion for a new trial was sufficient to render the non-production of the evidence prior to trial such that there was no violation of defendant's right of due process. The defense had a right, as noted above, to have this evidence made available to it at the time of the request. It is not this court's purpose to speculate at to what use the defense could or would have put the evidence in question, or what additional evidence it may or may not have led to, had it been turned over prior to trial. The fact remains that this evidence was not available as it should have been to defendant when his defense at trial was being planned and prepared. The belated turnover of these reports after trial was sufficient to deprive defendant of their effective use and in no way cured the harm done by failing to turn them over to defendant initially."
>
> (19 Ill. App.3d 683, 688.)

It is readily apparent that the decision below is utterly inconsistent and totally at odds with the prior rulings of

this Court, the applicable Illinois statute on point, and the decisions on point by the Illinois courts as forged in the heat of the pronouncements of this Court. In the case at bar the prosecution put on blinders in pursuit of a conviction, any conviction, of Donald Hammond at great expenditure of time and expense. In light of what has transpiredin this cause, the burden of affording to the defendant the due process of the law was slight. Even were the cost great, however, the Constitution will suffer no individual the denial of due process by the State in the course of a criminal proceeding. (The Constitution of the United States of America, Amendment XIV.) Why did the prosecution not make disclosure of the offer of immunity to witness Roscetti prior to or during trial? The answer is obvious; the prosecution was seeking an advantage in

concealing their agreement with Roscetti. The prosecution felt that its case would have been weaker had the offer of immunity been disclosed -- that the jury would have disbelieved the testimony of witness Roscetti purchased with the immunity and left the prosecution with no case at all. Rather than to risk an acquittal, the State gambled that a conviction would stand on appeal despite the concealment, despite the failure of the prosecution to afford the petitioner the due process of the law. At issue now is whether the prosecution's gamble will pay off at the expense of the rights guaranteed the petitioner by the Constitutional guarantee of due process of the law.

II

THE PETITIONER WAS DENIED A FAIR TRIAL AND DUE PROCESS OF THE LAW WHEN THE COURT ERRONEOUSLY INSTRUCTED THE JURY BY FAILING TO DEFINE THE OFFENSE OR TO IDEN-

TIFY THE CO-CONSPIRATORS PETITIONER WAS ALLEGED TO HAVE AGREED WITH AND ALLOWED THE CONVICTION TO STAND WHERE THE RECORD WAS INSUFFICIENT TO PROVE SUCH CHARGE BEYOND A REASONABLE DOUBT.

The Fifth Amendment to the United States Constitution decrees that no person shall be deprived of his life, liberty or property without due process of law. This fundamental and inalienable right was made applicable to state action by passage of the Fourteenth Amendment. The same basic liberties are guaranteed the defendant by Section 2 of Article I of the Constitution of the State of Illinois.

In a criminal prosecution, the State is required to prove its case beyond a reasonable doubt. This burden is not satisfied, however, where the state merely establishes a climate of activity that reeks of something foul -- to obtain a conspiracy conviction the prosecution must prove an agreement to accomplish an illegal

act. United States v. Wieschenberg, 604 F.2d 326 (5th Cir. 1979). The law is clear that the prosecution must prove each and every individual element of the offense, and to negate certain defenses by the same standard of proof. State v. Davis, 598 S.W. 2d 189 (Mo.App. 1980); State v. Allen, 293 N.W.2d 16 (Iowa 1980).

The record below is abundantly clear that the jury was never instructed as to the identity of the specific individuals with whom the defendant was alleged to have conspired, the date of the alleged conspiracy, or even as to the elements of a conspiracy. Effective January 1, 1979, Supreme Court Rule 451, Chapter 110A of the Illinois Revised Statutes, mandated that the Illinois Pattern Instructions in Criminal Cases (IPI - Criminal) be used where applicable, where the court determines that the jury should be instructed,

and where the instruction accurately states the law. The instant defendant was deprived of a fair trial and due process of the law by the failure of the court to properly instruct the jury as to the offense of conspiracy.

In dealing with inchoate offenses, the IPI - Criminal system first defines the offense and then identifies the issues. The following from the introduction to inchoate offenses sets forth the instruction procedure:

> "In this chapter, and succeeding chapters through 23, the general definitions of crimes are given and then broken down into elements or issues, and the burden of proof beyond a reasonable doubt is applied to them. Both the definition (e.g., 6.01) and the issues (e.g., 6.02) instructions should be given."
>
> (Illinois Judicial Conference Committee on Pattern Jury Instructions in Criminal Cases; ILLINOIS PATTERN JURY INSTRUCTIONS - CRIMINAL 57 [1968]).

In the case of conspiracy, the crime is defined in IPI - Criminal 6.03 and the

issues delineated in 6.04. Clearly, the system requires that both, or neither, instruction be given. IPI - Criminal 6.03 was offered as the prosecution's instruction number 12, which instruction was withdrawn by the prosecution. (VOLUME XIII, Page 103.) This left the prosecution's instruction number 20, IPI - Criminal 6.04 (modified), standing alone. The IPI - Criminal system clearly contemplates that the definition instruction (6.03) and the issue instruction (6.04) be given together. Supreme Court Rule 451 requires the use of IPI - Criminal instructions except in certain specified situations; there can be no argument here either that the jury should not have been instructed as to the definition of conspiracy or that IPI - Criminal 6.03 does not accurately state the law. Failure to instruct as to the definition of conspiracy was prejudicial error which

denied the petitioner a fair trial during the instruction procedure. Not only did the court fail to define the offense of conspiracy for the jury, but the court erred in instructing the jury as to the issues involved in the offense of conspiracy. The prosecution's instruction number twenty (20), given over defense objection, taken together with the court's failure to define conspiracy and the failure to identify the alleged co-conspirators, leaves no rational basis in the instructions from which the jury could find the petitioner guilty of the crime of conspiracy. This error is further compounded by giving, both originally and on reconsideration over defense objection, the prosecution's instruction eighteen (18), IPI - Criminal 3.01, which left even the date of the conspiracy offense to conjecture on the part of the jury.

While a conspirator need not have a direct dealing with each and every of his co-conspirators, indeed not even need know the identity of all the co-conspirators, agreement is prerequisite to a conspiracy. Further, the defendant in a criminal conspiracy proceeding must have intended to agree. The petitioner may well have been convicted of conspiracy from activities occurring on a date or an occurrence which he was not called upon to defend. The prosecution's instruction number twenty (20) opened the door to a conviction for agreeing with Kathy Woolums, who, the evidence disclosed, instructed Tommi Roscetti as to her prostitution duties, with various hotel personnel, with the mysterious prostitute on crutches referred to in the hearsay testimony of Agent Baley, or with Roscetti herself.

A jury is composed of laymen with

little or no conceptualization of the elements of a substantive criminal offense. Failure to instruct such laymen as to the definition of the offense charged leaves them free to define the occurrence for themselves, clearly an impermissible state of affairs. The additional failure to instruct the jury as to the date of the alleged offense and of the parties to the conspiracy compounds the prejudicial effect on the petitioner. It is respectfully submitted that these compound errors in instructing the jury denied the defendant the due process of the law, and thereby a fair trial, and mandate that the conspiracy conviction be set aside. Any conspiracy conviction made without knowledge of the co-conspirators, or even of the date thereof, clearly evidences an attempt on the part of the jury to punish the defendant for reasons not in evidence.

The failure of the prosecution to advise the jury as to the identity or existence of co-conspirators is only one step in the prosecution's failure to prove the defendant guilty beyond a reasonable doubt. This defendant was convicted of conspiracy on the basis of a conversation the defendant had with one Dorothy Rosectti, a/k/a Tommi Roscetti, a known prostitute with a voluminous record and a history of prostitution in Quincy, Illinois, prior to the alleged conversation together with "corroborating evidence" of his actions in assisting Illinois Bureau of Investigation agents at a later time. This is clearly insufficient evidence on which to base conviction for conspiracy to keep a place of prostitution. In United States v. Ford, 324 F.2d 950 (7th Cir. 1963), the defendant was convicted of conspiracy to sell or receive jewelry stolen in interstate

commerce. A burglar had stolen just under $20,000.00 worth of jewelry which he then sold to another party, Allison, for $400.00. The following day Allison attempted to sell some of the jewelry to several people including the defendant. There was evidence that the defendant took approximately eighteen rings and some watches to have them appraised but returned all to Allison save one woman's wristwatch which she purchased for $80.00. Other testimony was conflicting and failed to have the defendant taking any jewelry, failing to reach an agreement to purchase any jewelry or failing to place the defendant at the scene. The court advised that it was for the jury, and not the court, to determine whether there was substantial evidence which would support a verdict. Even taking all of the evidence in the light most favorable to the government, the court reversed the con-

viction finding the evidence insufficient to prove a concerted agreement. Inspecting the stolen jewelry, inquiring as to its price and even the purchase of the stolen watch was insufficient to establish conspiracy. In the case at bar, the only evidence of conspiracy was the alleged conversation of Tommi Roscetti with the defendant. During the course of her cross-examination Roscetti denied important particulars of that conversation, but even taking the evidence in the light most favorable to the prosecution, the only evidence against the defendant was a conversation concerning an ongoing arrangement. The evidence disclosed no concerted agreement, no conspiracy, and no overt act.

Directing the Court's attention to the recent case of United States v.

Alvarez, 610 F.2d 1250 (5th Cir. 1980), we are confronted with yet another case where even a substantial involvement in a criminal enterprise did not sustain a conspiracy conviction. Briefly stating the evidence against defendant Alvarez, he and two co-conspirators met two DEA agents at a Florida airport. Alvarez had driven his two co-conspirators to the airport in a pickup truck loaded with electrical appliances which he was to load onto a plane bound for Columbia. The plane was to fly back from Columbia with 110,000 pounds of marijuana. Alvarez indicated to one of the agents that he would be present at the off-loading site in the United States and inquired as to whether the agent was flying to Columbia on the plane. The agents then arrested all the parties prior to the plane leaving the airport.

The court declined to affirm

the conviction of Alvarez holding that a defendant does not join a conspiracy merely by participating in a substantive offense or by associating with persons who are members of a conspiracy, but that the agreement itself is the criminal act, an act which each of the conspirators has conceived in his own mind. To sustain a conviction, the prosecution must establish by substantial evidence and beyond a reasonable doubt the existence of an agreement, that Alvarez had the deliberate, knowing, specific intent to join the conspiracy. In the case before this Court, it was incumbent upon the prosecution to prove beyond a reasonable doubt that the defendant had a deliberate, knowing, specific intent to join the conspiracy; there must be substantial evidence of an agreement known to the defendant and to which he intended to be a party. The prosecution has not

met this burden. There is nothing of record to show that the defendant understood or intended to be party to any agreement. There is nothing in the record which justifies a jury finding of the existence of an agreement, particularly where the parties to the alleged agreement were never disclosed to the jury. Without sufficient evidence of record to sustain a conspiracy conviction, the record does not meet the Alvarez standards and cannot stand.

The decision below cannot be reconciled with the decisions of the federal courts in Ford and Alvarez. Without credible evidence of an agreement, without even suggesting the identity of those with whom the defendant is alleged to have conspired, the prosecution can only attempt to bolster its case by showing that the defendant was present at certain times and that acts of prostitution occurred at

other times. This evidence is not even close to what is required to sustain a conviction for conspiracy, rather, it is a conviction based upon a climate which reeks of something foul.

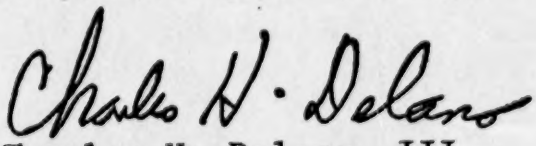
The term "due process" embodies an abstract concept of justice which does not readily lend itself to a precise and structured definition. It may be considered in its most basic intendment, however, the protection of the individual from arbitrary action. Ohio Bell Telephone Co. v. Public Utilities Com., 301 U.S. 292, 302 (1973). While it is certainly true that not all rights or privileges are protected by due process of law, there can be no right more inviolate than the right of an individual to a fair and impartial trial prior to any deprivation of his life, liberty or property. The failure of the State to prove each ele-

ment of the conspiracy offense mandates reversal of the conspiracy conviction.

CONCLUSION

WHEREFORE, your petitioner, Donald Hammond, respectfully prays this Honorable Court issue a writ of certiorari to review the judgment and opinion of the court below for all the reasons set forth herein.

Respectfully submitted,



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APPENDIX

OPINION BELOW. A-1

ORDER DENYING REHEARING. A-15

ORDER FROM ILLINOIS SUPREME COURT DENYING PETITION FOR LEAVE TO APPEAL. A-16

AFFIDAVIT OF SERVICE A-17

15484

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE FREDERICK S. GREEN Judge

HONORABLE RICHARD MILLS Judge

HONORABLE ALBERT G. WEBBER, III Judge

Attest: Thomas R. Appleton, Clerk

BE IT REMEMBERED, that to-wit: On the 11th day of APRIL A. D. 19 80 there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 15484

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	Circuit Court
Plaintiff-Appellee,	)	Mason County
	)	78-CF-70
v.	)	Adams County
	)	78-CF-92
DONALD HAMMOND,	)	
	)	Honorable David K.
Defendant-Appellant.	)	Slocum, Judge Presiding

Mr. JUSTICE GREEN delivered the opinion of the court:

Defendant, Donald Hammond, appeals from judgments of the circuit court of Adams County convicting him, after a jury trial, of the offenses of pandering and conspiracy to keep a place of prostitution, and sentencing him to concurrent sentences of 2 years' imprisonment for each offense and additionally fining him $5,000 for the conspiracy offense. The sentences were imposed on April 30, 1979, and arose from an indictment returned June 7, 1978.

He asserts that (1) the evidence was insufficient to support either conviction, (2) he was denied due process of law by the State's failure to inform him of the address of its principal witness and that she had been offered immunity,

(3) he was denied his right to a speedy trial, (4) the trial court erred (a) in admitting testimony showing another offense by defendant, (b) in admitting evidence of declarations of a co-conspirator before the introduction of evidence of a conspiracy, and (c) in ruling on jury instructions, and (5) the sentencing procedure was improper.

Section 8-2(a) of the Criminal Code of 1961 defines the inchoate offense of conspiracy in the following manner.

> "(a) Elements of the offense.
>
> A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator."

Ill. Rev. Stat. 1977, ch. 38, par. 8-2(a).

Section 11-17 of the Criminal Code includes within the definition of the offense of keeping a place of prostitution the following:

> "(a) Any person who has or exercises control over the use of any place which could offer seclusion or shelter for the practice of prostitution who performs any of the following

acts keeps a place of prostitution:

***

(2) Grants or permits the use of such place under circumstances from which he could reasonably know that the place is used or is to be used for purposes of prostitution." Ill. Rev. Stat. 1977, ch. 38, par. 11-17.

Section 11-16(a) of the Criminal Code describes in these words the type of pandering with which we are concerned here:

"(a) Any person who performs any of the following acts for money commits pandering:

***

(2) Arranges or offers to arrange a situation in which a person may practice prostitution." Ill. Rev. Stat. 1977, ch. 38, par. 11-16(a).

The prosecution's main witness was Dorothy Roscetti, a/k/a Tommi Roscetti, who testified to the following sequence of events. In February 1976, she met co-conspirator Lavada Woolums in Springfield, Illinois. Shortly thereafter, Woolums' sister-in-law took Roscetti to the New Virginia Hotel in Quincy, Illinois. After a few days at the hotel, Roscetti and defendant held a conversation wherein defendant told her that Woolums had called him and made arrangements for Roscetti to work as a

prostitute at the hotel. During this conversation, Roscetti and the defendant also discussed money arrangements. The defendant told her that the prices she charged would be left up to her. After making a pick-up in the bar she was to give the desk clerk $5 and sign in. When she came back downstairs, she was to give the bartender $5. She should then have at least $10 or $20 left. The defendant told her that he would take the money she made every night and put it in the safe. When Woolums or "someone" came into town, they would pick up the money. Roscetti testified that Woolums' brother did come and pick up the money.

About a week-and-a-half after she had arrived at the hotel, Roscetti went to West Quincy, Missouri, and spent the night there. After she returned to the New Virginia Hotel, she had another conversation with the defendant. He told her that he would let Woolums take care of the problem of her escape. He stated that he would call Woolums and inform him of her conduct. The next day, Woolums met with Roscetti. He beat her and told her not to leave anymore. About a week later, Roscetti again left the hotel for a weekend. When she returned, she had a similar conversation with the defendant. He said that he was going to call Woolums and inform Woolums that she had "messed up again."

Most of the remaining evidence in support of the prosecution came from Charles Baley who testified to the following occurrence of May 26, 1976. At that time, he

was a special agent of the Illinois Bureau of Investigation. He and a partner gave a male informant $25 and sent the informant into the New Virginia Hotel. Upon returning, the informant purported to have had intercourse there with a prostitute. The agents then went to the hotel to find the prostitute. There, they met defendant who aided them in their search. He produced the guest register cards for them and told the desk clerk to assist them. The prostitute had apparently left the hotel. Defendant said that the prostitute "would not return." When Baley pointed out to defendant the informant who claimed to have visited the prostitute, the defendant told Baley that if "his girl" were to be arrested, the informant should also be arrested. Baley testified that when he asked the defendant what "his girl" meant, the conversation ended abruptly.

We conclude that the foregoing evidence was sufficient to make a prima facie showing of defendant's guilt of conspiracy to keep a place of prostitution but not sufficient to make such a showing as to his guilt of pandering. The latter offense as involved here requires that the accused act for money in arranging or offering to arrange a situation in which a person may practice prostitution. There was no evidence here that defendant acted for money. The pandering conviction must be reversed.

Most of the proof of the elements of the conspiracy offense came from Roscetti's testimony regarding statements made to her by defendant on their first meeting. His statement to her that Woolums had arranged with him for her to practice prostitution at the hotel constituted an admission (1) that he had agreed with Woolums to keep a place of prostitution, and (2) that he had sufficient control of the hotel to do so. His explanation to her of her future operating procedure (1) was a substantial step towards keeping a house of prostitution, and (2) evidenced intent upon his part that the offense be committed. The testimony of these admissions by defendant constituted direct evidence. (See People v. Mancl (1977), 55 Ill. App. 3d 41, 45, 370 N.E.2d 664, 667.) Roscetti's testimony that Woolums later came to the hotel to pick up the money was circumstantial evidence corroborating the existence of an agreement.

Other circumstantial evidence of substantial significance came from the testimony of Baley that when he later went to the hotel, defendant (1) stopped Baley to inquire as to his activities there, (2) procured room registration cards for Baley, (3) instructed a clerk to accompany Baley to the room where the prostitute was supposedly located, (4) sent someone to pry open the door to that room, and (5) told Baley that if "his [defendant's] girl" was arrested the informant should also be arrested.

Defendant's reference to "his girl" in the context of the conversation could have been taken by the jury to infer that he was keeping prostitutes at the hotel and the other evidence showed his control at that time.

Evidence of an accused's commission of an offense not charged, even though committed subsequent to the one charged, is sometimes admissible to show a modus operandi. (People v. McDonald (1975), 62 Ill. 2d 448, 343 N.E.2d 489.) Evidence that defendant later kept a house of prostitution would tend to corroborate Roscetti's testimony that he earlier admitted to having agreed with Woolums to do so.

Defendant argues that even if a prima facie case of conspiracy was shown, it was too weak to support a conviction because it was substantially based upon the testimony of Roscetti who was not worthy of belief. Defendant introduced two statements she had made to the police in 1976 which contradicted her testimony in some aspects. In particular, Roscetti said that Woolums' sister-in-law and not the defendant had explained the prostitute pricing system to her. However, her testimony as to the other aspects of her conversation with defendant was not disputed. Roscetti also admitted that, prior to trial, she had been AWOL from the military twice and had been convicted of prostitution in South Carolina. Also, the witness' father and brother testified to her bad reputation for truth-telling and said that they would not believe her under oath. However, even

though Roscetti was an accomplice and the above infirmities were attendant to her testimony, that would not of itself make her testimony insufficient to support the conviction even if uncorroborated. (People v. Wollenberg (1967), 37 Ill. 2d 480, 229 N.E.2d 490; People v. Hansen (1963), 28 Ill. 2d 322, 192 N.E.2d 359; People v. Meisenhelter (1942), 381 Ill. 378, 45 N.E.2d 678.) As Baley's testimony gave some corroboration to Roscetti's story, and because her version of the events was not at all improbable, we conclude that the jury could properly have found defendant's guilt of the conspiracy offense to have been proved beyond a reasonable doubt.

Next, the defendant claims a denial of due process because the prosecution failed to fully and properly comply with discovery orders requesting Roscetti's address. The record reveals some stalling by the State in this respect but its task was hampered by Roscetti's refusal to state where she lived. Three weeks before trial the State did give the defense the name of the city where she was staying. Also, the defense was able to have a personal interview with the witness. Thus, the defense received sufficient information and disclosure to constitute adequate compliance with the discovery orders and to nullify the claim of due process violation. We do not find any error here to be reversible.

In defendant's second claim of lack of due process, he asserts that the prosecution withheld evidence favorable to the defense when it did not disclose an offer of immunity made to Roscetti. In Brady v. Maryland (1963), 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, the court held that due process requires the prosecution to furnish the defense with knowledge of evidence favorable to the defense. Here the defense had no knowledge of the offer of immunity until after the trial but the defendant had made no specific request for this information and did not even make a general request for any information favorable to his case. In United States v. Agurs (1976), 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342, the court held that, under those circumstances, the omission of the State to make disclosure of the favorable information constituted a deprivation of due process only if the undisclosed evidence created a reasonable doubt that did not otherwise exist. Here, the evidence of the offer of immunity could have been used to further impeach Roscetti. However, a significant amount of impeachment evidence was presented. Yet the jury chose to believe Roscetti. As the undisclosed evidence was merely repetitive of other impeachment evidence, we do not find it powerful enough to meet the Agurs requirement.

Defendant's claim of denial of his right to a speedy trial is based principally upon proceedings on an indictment returned on July 7, 1976, on a pandering charge arising from

the same facts as the charge here. After defendant had made an oral demand for a speedy trial, the case was dismissed upon the motion of the State. As we have held the evidence insufficient to support the pandering conviction, we need not decide whether that charge would be barred by failure to bring it to a timely trial. We likewise need not decide whether the conspiracy charge was barred by section 3-3 of the Criminal Code (Ill. Rev. Stat. 1977, ch. 38, par. 3-3) which requires that when the prosecution knows of two or more offenses committed by the defendant and arising out of the same conduct they must be brought in the same prosecution. Defendant argues that the conspiracy charge arose out of the same conduct as the pandering charge and became barred when the failure to grant defendant a speedy trial on the pandering charge ended that prosecution. This issue is raised for the first time on appeal and is, therefore, waived. People v. Pickett (1973), 54 Ill. 2d 280, 296 N.E.2d 856.

Defendant also claims a denial of his right to a speedy trial on the instant indictment. He made written demand on July 24, 1978, but the record clearly shows operation of sections 103-5(b) of the Code of Criminal Procedure (Ill. Rev. Stat. 1977, ch. 38, par. 103-5(b)) to have been tolled by various delays caused by him. As his offenses were alleged to have been committed before March 1, 1977, provisions of section 103-5(f) (Ill. Rev. Stat. 1977, ch. 38, par. 103-5(f)) did not operate to

make the delays merely cause a suspension of the running of the period. People v. Grant (1977), 68 Ill. 2d 1, 368 N.E.2d 909.

Defendant's complaint of error in the admission of evidence showing his commission of other offenses concerns the testimony of Baley, the special agent of the Illinois Bureau of Investigation. As we have previously indicated, we deem this evidence to have been properly admitted to show defendant's modus operandi.

Testimony of Roscetti as to declarations made to her by the alleged co-conspirator Woolums was admitted prior to proof of the conspiracy. This may be done within the discretion of the court and is not error if the conspiracy is subsequently proved. (People v. Baer (1976), 35 Ill. App. 3d 391, 342 N.E.2d 177.) In People v. Simpson (1976), 39 Ill. App. 3d 318, 349 N.E.2d 441, relied upon by defendant, proof of a conspiracy was never made.

Defendant raises a claim of error in regard to various jury instructions. He claims that Illinois Pattern Jury Instructions Criminal No. 6.03 should have been given. However, the defendant has waived this claim because he objected to IPI Criminal 6.03 when it was offered as People's Proposed Instruction No. 20. The People withdrew this instruction. Defendant objects to the denial of his instruction Nos. 11, 12, and 14. This

question cannot be decided because there is nothing in the record concerning the denial of these instructions. The record indicates that the instructions' conference adjourned after submission of defendant's instruction No. 10.

People's instruction Nos. 15A, 18, and 20 were properly given because they were the appropriate IPI Criminal instructions. The trial court did not err in refusing defendant's instructions No. 6 and 5. These were non-IPI Criminal instructions tendered in a situation where IPI instructions were sufficient. Defendant's instruction No. 1 (IPI 3.12) was properly refused. It concerned the impeachment of Roscetti and suggested she had been guilty of an infamous crime. Her prostitution convictions were not for an infamous crime. Ill. Rev. Stat. 1977, ch. 38, par. 124-1.

Finally, the defendant claims that he was improperly sentenced for two reasons. First, he says that the trial court incorrectly considered his prior arrests when determining the sentence. The trial court permitted the presentence report to contain lists of arrests. However, the trial judge informed the defendant by letter that, when sentencing, he would not give consideration to any arrests which did not result in convictions. He also wrote that he had never considered a mere arrest record when imposing sentences. Our decision in People v. Kennedy (1978), 66 Ill. App. 3d 35, 383 N.E.2d 255, explicitly condones the trial judge's actions. In that case, we recognized that

information on arrests is likely to be included in presentencing reports or come to the trial judge's attention in other ways. We said that this does not necessarily constitute error if the judge does not consider this information with reference to the likelihood that the defendant has in fact committed the conduct charged. We also said that it would be a good practice for the judge to recite into the record that he is not considering the information with reference to the type or severity of sentence imposed. In the instant case, the trial judge's conduct appropriately follows our recommendation in Kennedy.

The defendant also claims that an indictment pending against him was improperly disclosed to the trial judge. This disclosure was made during a hearing on a motion for a change of venue. The sentencing judge was not the same judge who presided at the venue hearing. The sentencing judge gave no indication that he was informed of the pending indictment.

For the reasons stated, we affirm the conviction and sentence for conspiracy to keep a place of prostitution and reverse the conviction and sentence for pandering.

Affirmed in part; reversed in part.

MILLS, P.J., and WEBBER, J., concur.

Appellate Court
Fourth Judicial District
Of Illinois

ROBERT L. CONN, CLERK
Springfield

The People of the State of Illinois,

Plaintiff-Appellee,

vs.

Donald Hammond,

Defendant-Appellant.

Appeal from Circuit Court

Mason County 78-CF-70
Adams County 78-CF-92

Gen No 15484

The Court having considered the Petition for Rehearing filed by the defendant-appellant in the above entitled cause, and being now sufficiently advised of and concerning the premises, it is ordered that said Petition be denied

/s/ Frederick S. Green

/s/ Richard Mills

/s/ Albert G. Webber III

JUDGES

FILED

MAY 1980

CLERK OF THE
APPELLATE COURT 4th DISTRICT

Form 4

United States of America

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* eighth *day of* September *in the year of our Lord, one thousand nine hundred and* eighty *, within and for the State of Illinois.*

PRESENT JOSEPH H. GOLDENHERSH, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD — JUSTICE DANIEL P. WARD

JUSTICE HOWARD C. RYAN — JUSTICE WILLIAM G. CLARK

JUSTICE THOMAS J. MORAN — JUSTICE THOMAS F. KLUCZYNSKI

TYRONE C. FAHNER, ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST CLELL L. WOODS, CLERK

Be It Remembered, *that, to-wit: on the* 29th *day of* September *19* 80 *, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:*

People State of Illinois,

Respondent

No. 53509 vs.

Donald Hammond,

Petitioner

Petition for Leave to Appeal from
Appellate Court
Fourth District
15484
78-CF-92

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

[redacted]

I, CLELL L. WOODS, *Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.*

In Witness Whereof, *I have hereunto subscribed my name and affixed the Seal of said Court this* 23rd *day of* October *, 19*80.

Clerk,

Supreme Court of the State of Illinois.

AFFIDAVIT OF SERVICE

I, the undersigned, David A. Stjern, an Attorney-at-Law in the employ of DELANO LAW OFFICES, P.C., being first duly sworn upon oath, depose and state that copies of the foregoing Petition for Writ of Certiorari were served by enclosing the same in suitable packaging properly addressed with first class postage fully prepaid, and by depositing same at a U.S. Post Office in Springfield, Illinois, on the 21st day of November, 1980; service was made in this manner upon the following persons at the accompanying addresses.

Michael Rodak, Jr.
SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, DC 20543
(40 copies)

Robert Bier
State's Attorney
Adams County Courthouse
Quincy, Illinois 62301
(3 copies)

Marc D. Towler
State's Attorney
Appellate Service Commission
Myers Building - Suite 909
Springfield, Illinois 62701
(3 copies)

David A. Stjern

SUBSCRIBED and SWORN to before me this 21st day of November, 1980.

Kathleen D. Winch
Notary Public